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No.

Office - Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

HUSTLER MAGAZINE, INC., AND LARRY C. FLYNT,
Petitioners,

vs.

ROBERT C. GUCCIONE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. In an action for libel based on the publication of a photo-cartoon, may an individual who was found by the appellate court as a matter of law to have no advance knowledge of, or involvement in, the publication of the cartoon, constitutionally be held liable for compensatory and punitive damages to an "all-purpose public figure" merely because the individual sued held the titles of Publisher of the magazine containing the cartoon and Chairman of the Board of Directors of the corporation which owned the magazine?

2. Where the appellate court has held, as a matter of law, that the individual defendant had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, does a jury charge which states:

> "You may find actual malice to exist if you find the material complained of to be false and 'fabricated' or a 'product of defendant's imagination'"

unconstitutionally permit the defendant to be found liable without fault for punitive and compensatory damages in favor of an "all purpose public figure" plaintiff?

3. Where the photo-cartoon sued upon was one of intended fiction in the form of parody and satire -- which by necessity had to be "false and fabricated or a product of defendants' imagination" -- does a jury charge which states:

> "You may find actual malice to exist if you find the material complained of to be false and 'fabricated' or a 'product of defendants' imagination'"

unconstitutionally permit the defendant to be found liable without fault for punitive and compensatory damages, in favor of an "all purpose public figure" plaintiff?

4. Are the defendants' due process rights to a trial by a fair and impartial fact-finder on the issue of liability denied when an appellate court remands the case for a new trial on the issue of damages alone, although the issues of liability and damages are interwoven, and the appellate court has found as a matter of law that the defendants were denied a fair trial on the issue of damages because of the extreme passion and prejudice of the jury, which: (1) attempted to put the defendants out of the publishing

business; (2) awarded damages in excess of $38,000,000 for a photo-cartoon; and (3) awarded more than 13 times the amount of damages that the trial court found to be reasonable?

PARTIES

Petitioners are Hustler Magazine, Inc., and Larry C. Flynt, who at all pertinent times was publisher of Hustler and chairman of the board of its corporate owner. Respondent is Robert C. Guccione, who at all pertinent times was editor and publisher of Penthouse Magazine and chairman of the board of its corporate owner.

RULE 28.1 STATEMENT

The parent company of Hustler Magazine is L.F.P., Inc.

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To the Supreme Court of Ohio

INTRODUCTION

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered in the above case on January 27, 1982, wherein said Court's jurisdiction was

refused with respect to Petitioners' appeal of the October 8, 1981 Decision of the Franklin County, Ohio Court of Appeals, entered on October 13, 1981, and to review the said October 8, 1981 Decision of the lower appellate court.

QUESTIONS PRESENTED

1. In an action for libel based on the publication of a photo-cartoon, may an individual who was found by the appellate court as a matter of law to have no advance knowledge of, or involvement in, the publication of the cartoon, constitutionally be held liable for compensatory and punitive damages to an "all-purpose public figure" merely because the individual sued held the titles of Publisher of the magazine containing the cartoon and Chairman of the Board of Directors of the corporation which owned the magazine?

2. Where the appellate court has held, as a matter of law, that the individual defendant had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, does a jury charge which states:

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PARTIES

Petitioners are Hustler Magazine, Inc., and Larry C. Flynt, who at all pertinent times was publisher of Hustler and chairman of the board of its corporate owner. Respondent is Robert C. Guccione, who at all pertinent times was editor and publisher of Penthouse Magazine and chairman of the board of its corporate owner.

RULE 28.1 STATEMENT

The parent company of Hustler Magazine is L.F.P., Inc.

OPINIONS BELOW

Petitioners' motion to certify the record was dismissed by the Ohio Supreme Court without public report. The October 8, 1981 Decision of the Court of Appeals of Franklin County, Ohio left standing by the Ohio Supreme Court's refusal to extend jurisdiction over this matter has not as yet been, and may not be, publicly reported. The pertinent Decisions and Entries are included with the Appendix to this Petition at pages A1-A60.

JURISDICTION

The Ohio Supreme Court's sua sponte refusal to grant jurisdiction over Petitioners' appeal was entered herein on January 27, 1982 and this petition for a writ of certiorari was filed within ninety (90) days following entry of that judgment as that time was

extended by this court's order for ten (10) days until May 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §2101(c) and Rule 17.1 (a), (b), United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

A. First Amendment to the United States Constitution. "Congress shall make no law. . .abridging the freedom of speech, or of the press. . ."

B. Fourteenth Amendment to the United States Constitution. ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

This action is based upon publication by Hustler Magazine, Inc. in the June, 1979 issue of Hustler of a

photo-cartoon relating to Robert C. Guccione, owner and publisher of Penthouse Magazine and other similar publications. Hustler had obtained a photograph of Guccione from United Press International for $50 and superimposed the head portion onto the photofigure of another male. That figure was placed behind and next to that of another person suggesting simulated sexual contact with such person. Guccione was shown in the photo-cartoon smiling and holding a jar of Vaseline, and the caption accompanying the photo-cartoon read "Great Moments in Porn No. 3 -- Bob Guccione discovers Vaseline." (See Appendix A72.) The testimony showed that by this publication Hustler was attempting to satirize Bob Guccione's widely publicized statements espousing and discussing open and variant sexual

conduct, and to parody his alleged use of Vaseline on the camera lens in taking his own "soft-focus" photographs of nude models which appeared in the centerfolds of his own Penthouse Magazine. The only witness on this subject was Lee Quarnstrom, "Bits & Pieces" editor of Hustler at the time. He testified (at pages 1691-1694 of the trial transcript), as is quoted on pages A118-120 of the Appendix to this Petition, regarding his intent and that of Hustler to parody and satirize Guccione's open sexual conduct and his "Vaseline lens" techniques by a photo-cartoon of the next logical sexually related use of Vaseline as a lubricant in sexual relations.

The sued upon photo cartoon was one of a series of three similar photo cartoons published in three consecutive issues of Hustler.

In the two immediately previous issues, Hustler had in similar fashion satirized and parodied two other famous publishers of sexually-oriented magazines depicting nudes--namely, Hustler's own publisher, Larry Flynt, and Hugh Hefner, publisher of Playboy Magazine. In the April 1979 issue of Hustler (Defendant's Ex. 306), Great Moments in Porn No. 1 had appeared. This was a photo-cartoon of a cropped head-photo of Larry Flynt on the body of the nude universal man handing to God, in Michaelangelo's "The Creation," a copy of Hustler Magazine. The title read: "Larry Flynt delivers a copy of Hustler to his first subscriber." (See Appendix A70). In the May 1979 issue of Hustler (Defendant's Ex. 307) Great Moments in Porn No. 2 was a photo-cartoon showing a cropped head photo of Hugh Hefner, replete with pipe, in

simulated sexual contact with a rabbit. The title read: "Hugh Hefner fucks his first bunny." (See Appendix A71). This was a parody on Hefner's alleged sexual relations with many of his magazine's models and waitresses who are known as "Bunnies".

Guccione filed suit on six counts against both Petitioners, two of which, based on a 1976 Hustler issue, were dismissed on motion prior to trial, and two more of which, based upon a February, 1979 Hustler publication, were voluntarily dismissed by the plaintiff at the close of his case-in-chief. The two remaining claims against the Petitioners emanated from the same publication, the June 1979 issue of Hustler. These claims were grounded upon libel as defined under Ohio law, and statutory invasion of privacy pursuant to §51, New York Civil

Rights Law (New York being the locus of Guccione's residence).

This action was tried to a jury. At the close of the evidence, arguments and instruction, the jury awarded Robert Guccione approximately $38,000,000.00 in damages against the Petitioners, $1,150,000.00 being "compensatory" damages for which Hustler and Larry C. Flynt personally were to be jointly and severally liable. Compensatory damages were not assessed against either the invasion of privacy or libel claims in a manner such that they could be attributed to either cause of action or either Defendant, as apart from the other. $26,000,000.00 was awarded in punitive damages against Flynt on both claims, although the jury awarded no compensatory or nominal damages against him on the privacy claim. $11,000,000 in punitive damages was assessed against

Hustler on both claims, although the jury failed to award compensatory or nominal damages against the magazine under the claim of libel.

The trial court, on April 16, 1980, filed a Decision overruling Flynt's motion for judgment n.o.v. and both of Defendants' motions for a new trial, on the condition that Guccione accept a remittitur of the punitive damages awarded against Flynt in excess of $2,000,000, and against Hustler in excess of $850,000, leaving the compensatory damage award intact. Shortly thereafter, the trial court revised its aforesaid Decision by journalizing an entry which changed that portion of the Decision relating to the remittitur. As entered, the remittitur reduced the punitive verdict on the invasion of privacy claim against Flynt to one dollar, and

remitted the punitive verdict on the theory of libel as against Hustler to one dollar. The Court left standing against both defendants jointly the compensatory verdict, but assessed the aforementioned $2,000,000 punitive damage verdict against Flynt on the libel claim, and the $850,000 punitive damage verdict against Hustler on the invasion of privacy claim.

Twenty assignments of error were thereafter raised in the Court of Appeals of Franklin County, Ohio; eight of which were found to be well taken in whole or in part. As a result, the appellate court reversed the trial court's remitted judgment, finding that the jury had attempted to put the Petitioners "... out of business by awarding an amount of punitive damages so great that they no longer could continue to publish...", and that since

the jury's awards of punitive damages were intended to destroy the Petitioners "rather than merely punish them for a specific intentionally wrongful and malicious act, the jury [had] acted with undue passion and prejudice." [Appendix at p. A40] However, the appellate court ordered a new trial only as to damages, notwithstanding the court's finding that the

> "...plaintiff was overly successful in his endeavor to appeal to the passion and prejudice of the jury and succeeded in having the jury return a verdict 13 times the amount which the trial court found to be reasonable. The enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice..." [Appendix at p. A41]

Thus, in spite of the extreme passion and prejudice of the jury against the Petitioners, the trial court affirmed the judgments of liabil-

ity against both petitioners, except with respect to the the invasion of privacy claim against Defendant Flynt.

As to the invasion of privacy claim, the Ohio Court of Appeals held that since Petitioner Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, he could not be held liable under the invasion of privacy claim. Nevertheless, the Ohio appellate court upheld the libel judgment against Petitioner Flynt even though he had no knowledge of, or involvement in, the photo-cartoon sued upon before publication, solely because Flynt held the position of Publisher and Chairman of the Board of the corporation which owned Hustler Magazine.

On attempted appeal to the Supreme Court of Ohio, Petitioners asserted five propositions of law. Petitioners

contended that neither compensatory nor punitive damages could properly have been assessed against Defendant Flynt individually for the alleged libel of the all-purpose public figure, Robert Guccione, where the Court of Appeals held as a matter of law that the evidence established that Petitioner Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon before it was published.

Petitioners also asserted that the trial court had erroneously left to the jury the question of determining whether the photo-cartoon constituted libel per se in company with a constitutionally impermissible jury charge permitting the assessment of Flynt's liability based upon a determination as to whether or not Flynt was "in control" of the corporation publishing the June, 1979 issue of Hustler; that the verdict,

having been obtained by passion and prejudice of the jury through prejudicial misconduct of Plaintiff's counsel as determined by the appellate court, required reversal of the judgments rendered against both defendants on liability as well as damages; that the jury verdicts were fatally defective as to the punitive damage awards, having been levied in the absence of jury findings of nominal or compensatory damages, and without distinction as to the defendants regarding the compensatory award; and that the trial court, in giving a jury charge suggested by the plaintiff purportedly based upon St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S.Ct. 1323 (1968), had unconstitutionally instructed the jury to the effect that the "fictitious" or "fabricated" character of a cartoon was a

constitutionally appropriate substitution for, or adequate means of satisfying, the "actual malice" standard set by this Court as to public-figure plaintiffs.

As noted above, the Supreme Court of Ohio refused jurisdiction over Petitioner's appeal, dismissing it sua sponte.

REASONS FOR GRANTING THE WRIT

A. Liability for Libel of a Public Figure Constitutionally Requires Actual Advance Knowledge of, or Involvement in, the allegedly Libelous Publication.

It can be said without fear of genuine contradiction that the plaintiff, Robert Guccione, had willingly "thrust himself into the vortex" of the widest public controversy concerning open and often aberrant sexual conduct well prior to publication of the June, 1979 issue of Hustler which is the

subject of this Petition. In ruling upon Petitioners' pre-trial motion to declare Guccione's public figure status, the trial court in this action wrote in its Decision of November 23, 1979:

> ". . .Plaintiff Guccione does have a substantial amount of media access, through his own and other publications and through a variety of public appearances, and has a familiarity with the media and the methods of obtaining personal publicity . . .
> Further, Plaintiff Guccione has voluntarily entered the area of discussion and debate on the alleged joys of unfettered sexuality of almost any form accompanied by an unrelenting attack on biblical precepts of sexual morality through his wholly owned publications and other avenues of public expression. His publications also have dealt at length with political controversy. Plaintiff Guccione did not obtain the recognition he has as a result of the alleged defamatory publications in this case. Guccione has widespread business and financial interests which have led to a substantial amount of public notoriety." [Appendix at pp. A75-76]

Accordingly, the trial court held that Robert C. Guccione "is a public figure for all purposes".

Mr. Guccione did not contest his all-purpose public figure status at trial or on appeal, and indeed testified in acceptance of such a legal characterization.

In this context, Plaintiff Guccione should have been required to prove "actual malice" by the standard of "clear and convincing" evidence in order to constitutionally permit a finding of liability against Larry Flynt for libel, especially since the Ohio Court of Appeals held, as a matter of law, that Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon prior to its publication. Instead the Court permitted a jury charge which stated that Larry Flynt could be found to have had "actual malice" merely if the photo-cartoon of which he had no knowledge of, or involvement in, prior to its publica-

tion "was false and fabricated or a product of defendant's imagination."

Although the trial court correctly defined "actual malice" in one portion of its charge to the jury as to libel, it also impermissibly redefined or eviscerated that definition in other portions of the libel charge which permitted a finding of "actual malice" where the photo-cartoon was intended to be fictitious, if such intended fiction was "false or fabricated" or a "product of the defendant's imagination."

In March of 1978, Defendant Larry C. Flynt had been shot and almost killed in Georgia. The evidence presented at trial as to Flynt's personal association with the publication of the June, 1979 issue of Hustler was to the effect that he had been hospitalized for long periods of time shortly prior to that date, had undergone various forms of

drug and other therapy, and, as a paraplegic, was not actively involved in the business of publishing Hustler for the pertinent period.

In holding that the invasion of privacy claim against Flynt should be reversed, the Franklin County, Ohio Court of Appeals noted that §51, N.Y.C.R.L., authorizes an award of punitive damages only "if the defendant shall have knowingly used such person's name, portrait or picture." (Emphasis added.) The Ohio Court of Appeals rejected Petitioners' assertion that the plaintiff was required to prove Flynt's knowing, unauthorized use of Guccione's photo by the standard of "clear and convincing" evidence, but nevertheless held that:

> "A review of the record reveals no evidence whatsoever supporting the invasion-of-privacy claim as against defendant Flynt. . .

Although defendants incorrectly indicate that plaintiff's burden of proof is by clear and convincing evidence, nevertheless, plaintiff provided no evidence from which it could be inferred that defendant Flynt had any connection with the June 1979 publication other than as publisher of Hustler. There is no evidence of direct involvement with respect to this particular publication, either by use of plaintiff's name or the obtaining of the photograph and use thereof, although there was evidence that three years previously defendant Flynt had considerable direct involvement with respect to the May 1976 issue of Hustler. In the meantime, defendant Flynt had been injured by an assassin's bullet, and, according to his testimony, had never resumed the same type of direct involvement in publication of Hustler as he had previously. Even if the trier of the fact does not believe Flynt, at best, the evidence is then in equipoise. Construing the evidence most strongly in favor of plaintiff, reasonable minds could only conclude that defendant Flynt was not personally responsible for any invasion of plaintiff's privacy in violation of the New York statute that may have been committed by Hustler, Inc. His position as publisher and chairman of the board of Hustler does not make him responsible for an invasion of privacy in violation of the New York Statute of which he has no personal involvement." (Emphasis added.) [Appendix at pp. A22-23]

Notwithstanding the Ohio Court of Appeals reversal on the invasion of privacy claim against Flynt on the ground that he had no connection with, or involvement in, the publication of the photo-cartoon sued upon, the Court went on to uphold the libel judgment against Flynt based on the same photo-cartoon stating:

> "On the other hand, defendant Flynt's position as the publisher and chairman of the board of Hustler makes him individually liable for a libel printed in Hustler, even if he had no actual knowledge of the libel prior to its publication..." (Emphasis added). [Appendix at pp. A22-23]

Thus, the Ohio appellate court held that Flynt was liable for "publication" of an allegedly libelous photo-cartoon of the public figure Guccione, even though the appellate court had held, as a matter of law, that Flynt had no actual knowledge of, or involvement in, the publication of the photo-cartoon--

let alone the constitutionally required actual malice, proven by clear and convincing evidence. In short, Flynt was liable for the photo-cartoon without fault!

Petitioners submit that a line of cases, commencing with Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967), logically compel a finding that Larry Flynt could not constitutionally have been held to be liable upon Guccione's libel claim in view of the Ohio appellate court's contemporaneous determination that, as a matter of law, the evidence failed to prove that Flynt even had prior knowledge of the photo-cartoon sued upon by a "preponderance" standard, let alone "actual malice" proven by a standard of "clear and convincing" evidence.

Although Guccione sought, and was also refused, the jurisdiction of the Ohio Supreme Court upon appeal, he did not allege the existence of a constitutional issue, and the lower appellate court's determination of the facts related above as to Petitioner Flynt are now final. While many of the cases decided by this Honorable Court have involved only defamation claims against a publishing company and not against an individual such as Flynt; there are, of course, benchmark decisions issued by this Court in which application of the "actual malice" standard of proof was held to be necessary in determining the liability of the individual responsible for publication of an article or broadcast, such as Flynt, without material distinction from those cases in which only the magazine, newspaper or radio station was sued. See, e.g., Gertz v.

Welch, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); Herbert v. Lando, 441 U.S. 153, 60 L. Ed. 2d 115, 99 S. Ct. 1635.

Petitioners submit that violations of the First and Fourteenth Amendments to the United States Constitution resulted from the trial court's submission of Guccione's libel claims against Larry Flynt to the jury under a charge which focused, over objection, upon Flynt's "control" over the publication of Hustler in the abstract, and which permitted a finding of liability without fault, in the absence of adequate proof that he had knowledge of the existence of the photo-cartoon sued upon before publication; much less knowledge of the "falsity" of the satirical photo-cartoon in question, or even a high degree of awareness of the probability of such "falsity". Gertz v. Welch, supra;

Curtis Publishing Co. v. Butts, supra; St. Amant v. Thompson, supra; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 19 L. Ed. 2d 248, 88 S. Ct. 197 (1967).

Likewise, the same constitutional guarantees of freedom of the press and of speech were violated through the trial court's refusal to instruct the jury as requested by Petitioners that liability of Hustler under the New York statute for invasion of privacy could be found only upon a showing of "actual malice". See Time v. Hill, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967).

B. The Court's Instruction Permitting the Jury to Find "Actual Malice" merely by finding the Material to be "False and Fabricated or a Product of the Defendants' Imagination" was Unconstitutional because it was Without Regard to Whether the Defendants: 1) had prior knowledge or involvement in the allegedly libelous publication; 2) intended the publication to be a statement of fact; and 3) knew of the falsity of the statement or published it without regard to its truth or falsity.

In his charge to the jury the trial court pronounced the following instruction of law:

> "If you find Plaintiff's Exhibit A is libel per se, then a presumption arises as to damage to reputation."

Thereafter followed additional instructions which inescapably led to the understanding that the court had left to the jury the question of determining whether or not a per se libel had been published about the plaintiff.

As 34 Ohio Jur. 2d, Libel and Slander correctly reads, in §156:

> "The rule is well settled in Ohio that where the words of a publication are not ambiguous or uncertain as to their definition, it is the sole function of the court to determine whether such words constitute libel per se, and it is error to leave such a question to a jury."

While this particular, clearly erroneous jury instruction was not in and of itself given to the detriment of the defendants, it became clear in the

remainder of the charge that the jury had been left to speculate that if they merely found that the June, 1979 Hustler photograph depicted Guccione in a "fictitious," or "fabricated" sexual act which was the "product of the Defendant's imagination", they were entitled to award compensatory damages against Flynt, and to entirely misapply the constitutionally required "actual malice" standard of proof by substituting the words "fabrication" and "product of imagination" for proof of Flynt's actual knowledge of both the existence of the photo-cartoon and its "falsity" (despite the conflicting appearance elsewhere in the charge of a proper definition of "actual malice").

The court's actual charge in error reads:

> "You may find actual malice to exist if you find the material complained of to be false, and

fabricated, or a product of the Defendant's imagination." [Appendix at p. A91]

Objections were interposed by defense counsel to this aspect of the charge, for this portion of the instructions was based on a serious misreading of St. Amant v. Thompson, supra, upon which Guccione's counsel had insisted. The Court's charge pursuant to St. Amant would have been proper as to Flynt, only if it had been proven that Petitioner Flynt not only knew about the existence of the photo-cartoon prior to its publication, but that in addition Flynt had serious doubts about the truthfulness of the photo-cartoon. As set forth previously the Court of Appeals held, as a matter of law, that Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon prior to its publication. In St. Amant v. Thompson, supra, the terms "fabrica-

tion" and "product of imagination" were discussed by this Court in the following context only:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.
> Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." [St. Amant, supra, p. 732]

The trial court's charge so obviously conflicts with the constitutional requirements that Defendant Flynt not only knew about the photo-cartoon sued upon prior to its publication, but that he also entertained serious doubts as

to its truthfulness, that one might conclude that the trial court had accepted the plaintiff's proffered instruction without carefully reading St. Amant v. Thompson, wherein it is stated:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." [St. Amant, supra, p. 731]

See also Time v. Hill, supra (calculated falsehoods); and Garrison v. Louisiana (1964), 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (knowingly and deliberately published lie.)

Moreover, the very paragraph in which the words "fabrication" and "product of his imagination" appear in the St. Amant opinion above begins with the given fact that the defendant in that case had been personally aware of the publication complained of before it

was published. At trial he was contending only that he had believed the published language to have been true at the time of publication.

In the case at bar, an insight into the trial court's misconception of the significance of the "actual malice" standard under St. Amant v. Thompson is provided in his April 16, 1980 post-trial Decision, whereunder the court refused to render judgment in Flynt's favor, n.o.v. The trial court left $1,150,000 in "compensatory" damages and $2,000,000 in punitive standing under the libel claim, on remittitur, against Larry Flynt personally, stating:

> "Thus, we are left with an allowance of a proper amount with respect to the respective Defendants on the libel count. Mr. Flynt was plainly the architect of the pattern of malice. Hustler Magazine was merely the vehicle for striking the final blow. Thus, Mr. Flynt bears more culpability for the malicious and unprovoked attack on Plaintiff." [April 6, 1980 Decision, p. 10]

(Emphasis added) [Appendix at p. A48]

In other words, the trial court erroneously concluded that the mere fact that Petitioner Flynt held the titles of publisher of Hustler and chairman of the board of its corporate owner is equivalent to having both actual knowledge of the photo-cartoon sued upon before its publication and serious doubts about the truthfulness of the photo-cartoon. Therefore, the trial court erroneously concluded that (1) "actual malice" could be found under St. Amant merely if the photo-cartoon were false and "fabricated" or a "product of defendants' imagination", and (2) general ill will and spite could also be found merely because of the above titles held by Flynt.

Thus, since the Ohio appellate court held as a matter of law that

Larry Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, the St. Amant instruction herein unconstitutionally permitted a judgment of liability and damages in favor of an all-purpose public figure without any showing of fault whatsoever on behalf of Petitioner Flynt.

C. A Jury Instruction that a Parody or Satire can be Libelous merely because it is "False and Fabricated", or the Product of the Defendant's Imagination" is Unconstitutional.

In the context of the intended fiction in the form of parody or satire aimed at an all-purpose public figure, the same instruction to the jury (which is the subject of the Second Question Presented) inescapably led the jury to improperly focus upon only the non-factual character of the photo-cartoon sued upon; without proper regard to the

inherent character of parody or satire, which of necessity has to be "false", "fabricated", or "a product of Defendant's imagination."

As this Court aptly wrote in Gertz v. Welch, supra:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (418 U.S. 339, 41 L.Ed. 2d at 805)...
>
> More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." (418 U.S. at 345; 41 L. Ed. 2d at 808)

The photo-cartoon in question, although it may be inappropriate and

offensive if appearing in other media and if concerning persons other than Bob Guccione, was nevertheless a fair satirization of Guccione's open sexual conduct and his "Vaseline lens," or soft-focus photographic techniques. (See testimony of Lee Quarnstrum referenced hereinafter.)

As shown above in the discussion of the Second Question Presented, the only witness on the subject of the intended parody and satire testified that his intent and that of Hustler Magazine was to parody and satirize Guccione's open sexual conduct and his "Vaseline lens" techniques by a photo-cartoon depicting the next logical sexually related use of Vaseline as a lubricant in sexual relations. As such, it constituted an "uninhibited, robust and wide-open" expression of an issue legitimately before the readers served by both Larry Flynt's

Hustler Magazine and Bob Guccione's Penthouse. See Rosenbloom v. Metro media, Inc., 403 U.S. 29, 29 L. Ed, 2d 296, 91 S. Ct. 1811 (1971). And as this Court has held,

> "The line between the informing and the entertaining is too elusive for protection of . . . (freedom of the press)." Winters v. New York, 333 U.S. 507, 510, 92 L. Ed. 840, 847, 68 S. Ct. 665 . . .

And,

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." [Bridges v. California, 314 U.S. 252, 269, 86 L. Ed. 192, 206, 62 S. Ct. 190]

Where the subject is intended to be a treatment of a matter of legitimate public interest (matters of taste aside), this Court has held that the defamation plaintiff should not recover against the defendant without satisfying an "actual malice" standard of proof, even where the plaintiff himself

is not a "public figure" or "public official."

Without further definition of "fabrication" and "product of imagination" the jury was improperly left with the opportunity to erroneously conclude that the intended fictional treatment of matters of public interest in the form of parody and satire can result in liability under the "actual malice" standard merely because the parody or satire was "fabricated" or a "product of the defendant's imagination". Or as stated by Robert D. Sack in his well-known treatise Libel, Slander and Related Problems (1980) at 246:

> "If, indeed, the work is meant to be commentary on a public figure, then it should be protected as opinion, either under constitutional or common law. Although it appears in the guise of statements of fact, it is clearly meant to be a statement of personal opinion, and such personal opinion can neither be true nor false nor libelous. Thus, if someone wishes to convey

> the notion that a particular American president is ineffective, he should not be limited to expressing that view by saying it in so many words. He should be permitted to convey the view more dramatically through the use of admittedly invented verbal images." (Emphasis added)

See Yorty v. Chandler, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970).

"Fabrication" for the purpose of intended parody and satire of the photo-cartoon at issue here simply does not "make substantial danger to reputation apparent" as to Bob Guccione, within the meaning of Gertz v. Welch, supra at 418 U.S. 348, 41 L. Ed. 2d at 810. Permitting the jury to find liability under such an instruction, and in consideration of the evidence presented in this case, was to impose liability without fault contrary to the First and Fourteenth Amendments.

The Court's error was even further compounded by its failure to permit

Petitioners to present expert testimony on parody and satire. [Appendix at p. A24]

Indeed, the decision of the Ohio Court of Appeals decision requires the Defendant, not the Plaintiff, to prove that in a case of intended fiction as parody or satire that it is manifestly clear from the language employed and pictures used that they could in no way be regarded as defamatory. Or in the words of the Ohio Court of Appeals in this case:

> "The defense that what would otherwise be libelous was satire or spoken in jest is available only if the defendants prove that it is manifestly clear from the language employed and pictures used that together they could in no respect be regarded as an attack upon the reputation or business of the person named or depicted." (Emphasis added.) [Appendix at p. A24]

The effect of the above rule of law is to not only eliminate the constitutional requirement of actual malice

proven by clear and convincing evidence, but in effect to shift that burden to the Defendant!

If the jury charge challenged in this and the preceding question presented passes constitutional muster, and is to become the standard, then parody and satire will no longer be possible as a permitted form of expression.

D. Due Process Requires that a New Trial be Granted as to Both Liability and Damages When 1) a New Trial is Granted as to Damages Because the Jury's Award was the Result of Extensive Passion and Prejudice; 2) the Issue of Damages and Liability are Inextricably Intertwined; and 3) Defendant Flynt was Found Liable for Invasion of Privacy in the Absence of Evidence of his Knowledge or Involvement in the Publication, Even Though the Jury was Instructed that Actual Knowledge is an Element of that Tort

The record in this case clearly establishes prejudicial misconduct on the par. of Mr. Guccione's New York co-counsel Norman Roy Grutman. This

misconduct by Mr. Grutman commenced as abuse of the discovery process, continued throughout the trial and culminated in an improper and successful appeal to the prejudice and passion of the jury during Mr. Grutman's closing argument. Mr. Grutman's misconduct during the trial which prejudicially interfered with the ability of the trial court to control the trial proceedings was the subject of Assignment of Error No. 6 by Petitioners to the Court of Appeals. The highly improper and prejudicial closing argument given by Mr. Grutman elicited a Motion for Mistrial on the part of Petitioners immediately following the close of Mr. Grutman's argument.

Although the Franklin County Court of Appeals found that the "verdict of the jury was one influenced by passion and prejudice" and that a new trial was

therefore necessary as to damages, the Court of Appeals refused to order a full remand for a new trial on both damages and liability.

In the instant case, highly prejudicial misconduct on the part of Mr. Grutman is found, inter alia, in his direct appeal to the passions and prejudices of the jurors in his closing "argument", which reads, in part:

> "Robert Guccione is here, as I will tell you in a moment, not just for himself, he is here for all of us. He is here for himself. He is here for Jackie Kennedy Onassis, for Betty White, for all of the persons upon whom Larry Flynt would heap his calumnies, his abuse, his insults, and his gratuitous falsehoods, and if there is no protection, if there is no vindication for Robert Guccione, then there is no protection for anyone. If this is a society that has become so ripened with selfishness that its members can think only of themselves and not have an interest in our neighbors or our brothers, then this sadly is a society in a state of disillusion that no court and no law can save. But I do not think that, nor does my client think that.

As I say, we have come to Ohio to the crossroads, to the gate way of middle America. We have come to the state that has produced eight United States Presidents, three Chief Justices of the Supreme Court of the United States, thirty-five cabinet officers, and one Larry Flynt, and we are going to say to Larry Flynt with your verdict, "Goodbye Columbus."

This is a case where I will ask you on the evidence to send the message and to express outrage and the indignation that properly belongs against a man who is, as I say is a liar, and I say a man who is a fraud-strong word . . .

If you award a verdict against Larry Flynt several hundred thousand dollars above the several hundred thousand dollars of lawyers' fees already expended to make Mr. Guccione whole, do not think that would stop Larry Flynt, a man who has a cash flow that he admits that is more than a million and a half dollars a week? Now, these are sums, I know, astronomical, and outside of the experience of almost all of you, all of us, but that is the reality of the bloated Larry Flynt, a man heaped upon on his own ill-gotten success. A modest verdict, he will rear back and roar at you, and will have gotten away with it, and what will happen next month or the next month after to Mr. Guccione, to his mother, to Ms. Keeton, to his children, to President Carter?

(Mr. Brownfield): Object.

(Mr. Grutman): To anyone whom he may elect to vent his spiteful vicious ire upon. That is the focus. How do you stop that man? How do you stop him? I have calculated from the figures which the Flynt organization provided to us that of the magazines which are involved in the publications of the specific evils against Mr. Guccione, Mr. Flynt probably made over ten million dollars, and I could ask you rationally, as a matter of punitive damages, to stop Mr. Flynt by making him pay back the money that he made on this vile pile of swill.

(Mr. Brownfield): Object." [Trial Trans., pp. 1897, 1916-1917 (Emphasis added)] [Appendix at pp. A38-39]

The record accurately discloses just how far beyond proper advocacy Mr. Grutman traveled in his argument. Defendants moved for a mistrial immediately following Mr. Grutman's closing argument.

This blatant appeal to the passion and prejudice of the jury in argument and in the presentation of "evidence"

was demonstrated by the $38,000,000.00 jury verdicts, and was recognized by the Franklin County, Ohio Court of Appeals in the following words:

> "Many of these appeals to the passion and prejudice of the jury have been discussed in connection with other assignments of error. In addition, a portion of the closing argument of plaintiff's counsel clearly reveals an appeal to passion and prejudice. (Tr. 1915-1916). [Decision of Court of Appeals, p. 3121 (Emphasis added)]
>
> However, under the circumstances of this case, plaintiff was overly successful in his endeavor to appeal to passion and prejudice of the jury and succeeded in having the jury return a verdict 13 times the amount which the trial court felt was reasonable. This enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice, and, accordingly, a new trial must be ordered upon the issue of damages." [Decision of Court of Appeals, p.3123 (Emphasis added)] [Appendix at pp. A38, A41]

The law in Ohio should have required a reversal of the judgment as to liabil-

ity as well as damages.

> "Where the factual questions being considered by a jury are in near equipoise, improper argument of counsel should be closely scrutinized, and where the damages awarded are excessive and appear to have been given under the influence of passion and prejudice, the resulting prejudice cannot be corrected by remittitur; the only recourse is the granting of a new trial." (Citing case) [Book v. Erskine & Sons, Inc., 154 Ohio St. 391 (1952) (Syl. #2)]

> "The conduct of plaintiff's counsel was reprehensible and inexcusable, and, unprovoked as it was, constituted reversible error regardless of the lack of objection." [Jones v. Macedonia-North Field Banking Co. (1937) 132 Ohio St. 341, 351]

See also Penthouse International, Ltd. v. Playboy Enterprises, Inc., (S.D. N.Y., 1980), 86 F.R.D., 396, aff'd 2nd Circuit Court of Appeals (2nd Cir., 1981)____F.2d____, decision rendered October 28, 1981, Nos. 449, 450-451.

Likewise, in direct examination of his client, Guccione's counsel engaged in the following sort of questioning,

which elicited these answers:

"(Mr. Guccione): No, I couldn't say that I have lost any business.

(Mr. Sturtz): Object to that, Your Honor.

(The Court): I think we should give the precise stipulation to the Jury.

(Mr. Grutman): I'll stipulate, Your Honor, that no claim is being made in this lawsuit to recover any damages for business lost by Mr. Guccione.

(The Court): Okay.

(Mr. Grutman): I'm inquiring, specifically, Mr. Guccione, about how you felt emotionally, what concerns you had and try to explain that the best way you can for the ladies and gentlement of the jury and for Judge Wright.

(Mr. Guccione): I was very much aware of my public figure status, and since this was one link in a long chain of similar experiences with Hustler Magazine, I worried very much what the next step would be. Would it be a picture of my daughter, who was then 18 years old, would it be my mother appearing in the centerfold. All of this was possible as it had already been demonstrated to us.

As a public figure, I felt there may be an argument as to how much

privacy I was entitled to as an individual. But what concerned me most profoundly at the time was to what extent was the privacy of my mother, my father-
(Mr. Sturtz): Objection, Your Honor.
(Mr. Guccione): --my children, my friends and my colleagues, the people I work with, the woman I love.
(The Court): Just a moment.
(Mr. Guccione): To what extent was their privacy, also surrendered.
(The Court): Just a moment. There has been an objection lodged. Grounds for your objection?
(Mr. Sturtz): They are not public figures, they are not before the Court, they are not plaintiffs.
(The Court): Of course they are not. However, I think the witness is entitled to go into his thought process. And you may continue. I think you are correct but with that limiting statement you are dealing only with Mr. Guccione's thought processes at the time.
(Mr. Grutman): You were saying, Mr. Guccione, you were concerned what would be the next step that Mr. Flynt would take?
(Mr. Guccione): Yes, very much so." [Trial Trans., pp. 545-547 (emphasis added)] [Appendix at p. A11-12]

This testimony was a gross and gratuitous irrelevance. The obvious and sole purpose of which was to add fuel to the flames of prejudice which were nurtured by the plaintiff throughout

this trial, as the Court of Appeals later held. An elementary legal premise is that the plaintiff's mental suffering, which was what his whole claim for compensatory damage amounts to, is recoverable only for the publication upon which suit is brought.

By the above testimony, Plaintiff based his claim for damages on a publication which not only was not the one sued upon, it was one which existed only in his imagination and was not even about him. In so doing, he cleverly chose the most inflammatory version he could imagine.

A second well-established legal premise is that a plaintiff cannot recover for damages to the reputation or feelings of persons other than himself. If he suffers mentally because of the suffering he sees to a member of his family, his own suffering is an

element of recoverable damages, but the damage to the other is not. Necessarily subsumed in this premise is the premise that the publication must be about the plaintiff.

The Court of Appeals agreed with this characterization of the above-quoted testimony in setting aside the damage awards; but, in violation of Defendants' due process rights, left an unfair and partial jury's determination of liability intact based, in goodly part, upon the same evidence.

In other words, the extreme prejudice and passion which led the jury to attempt to put the petitioners "out of business by awarding an amount of punitive damages so great that they no longer could continue to publish" infected, tainted and poisoned the jury's verdict against petitioners on the issue of liability, as well as

damages, in violation of Petitioners' due process rights to a jury trial by a fair and impartial jury. One of the clearest indications of the fact that the extreme prejudice and passion of the jury infected, tainted and poisoned the verdict of liability, as well as damages, is that the jury found that Flynt was liable for damages for libel and invasion of privacy, even though the appellate court held, as a matter of law, that he had no actual knowledge of, or involvement in, the publication of the photo-cartoon sued upon. The appellate court summarized the extreme nature of the jury's passion and prejudice as follows:

> "... the jury return[ed] a verdict 13 times the amount which the trial court found to be reasonable. [The] enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was influenced by passion and preju-

dice." [Appendix at p. A41]

This Court has held that in both criminal and civil cases, the purpose of the right to trial by jury is "to assure a fair and equitable resolution of factual issues." Gasoline Products Co. v. Champlin Co., 283 U.S. 494, 498, 75 L. Ed. 1188, 51 S.Ct. 513 (1931); Colgrove v. Battin, 413 U.S. 149, 157, 37 L. Ed. 2d 522, 529, 93 S. Ct. 2448 (1973); cf. Viereck v. United States, 318 U.S. 236, 87 L. Ed. 734, 741, 63 S. Ct. 561 (1943).

There are two separate independent reasons why the Ohio Court of Appeals unconstitutionally deprived petitioners of due process when they ordered a new trial only on the issue of damages after having found that (1) the jury's $38,000,000.00 verdict for the photo-cartoon "was more than thirteen times what a reasonable jury would have

found," (2) "the grossly excessive verdict was influenced by passion and prejudices", and (3) that there was "no evidence from which it could be inferred that defendant Flynt had any connection..." with the publication of the issue of Hustler which contained the photo-cartoon.

First, it is respectfully submitted that due process clearly requires that Petitioners were entitled to receive a jury's verdict untainted by bias, prejudice or passion on the issue of liability as well as damages. Many federal and state cases have held that a verdict cannot be permitted to stand when it is found to be in any degree the result of appeals to passion and prejudice. In Minneapolis, St. Paul and S.S.M.Ry Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931), this Court reversed a trial court's

judgment which had been entered after the trial court had found a jury's award of damages to be excessive, but had accepted a remittitur. As the Court noted:

> "obviously such means (appeals to passion and prejudice) may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant getting a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon its opponent." 283 U.S. at 521-522.

However, in the instant case there is compelling evidence that the tainted and grossly excessive $38,000,000 jury verdict on damages caused by extreme passion and prejudice actually infected and poisoned the verdict of liability. As noted previously, the jury awarded very substantial damages against Petitioner Flynt for invasion of privacy and libel, even though the Ohio appellate

court found as a matter of law that no reasonable jury could have concluded that Flynt had any knowledge of, or involvement in, the photo-cartoon sued upon.

Although this Court did not explicitly mention due process in Minneapolis, St. Paul and S.S.M.Ry Co., supra, the underlying rationale of its holding is obviously a due process concern. Several federal court of appeals cases have followed this case and, when they have found that an excessive verdict was a result of passion, prejudice or caprice, have denied the power of the Court simply to accept a remittitur. See, e.g. National Surety Co. v. Jean, 61 F.2d 197 (6th Cir. 1932); Brabham v. State of Mississippi, 96 F.2d 210 (5th Cir. 1938). By ordering a new trial on the issue of damages alone, the Ohio appellate court, in effect, unconstitu-

tionally ordered a remittitur, when they should have reversed the entire verdict.

The second reason why the due process clause requires that the jury's verdict of liability be set aside, in addition to the grossly excessive damage verdict caused by extreme passion and prejudice, is that in this case the issue of damages is so closely connected to the issue of liability that the jury could not fairly and impartially examine the issue of damages alone without also considering the question of liability. As this court stated in Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 75 L.Ed. 1188, 51 S. Ct. 513, 515 (1930),

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. (citations omitted) Here the question of damages on the counterclaim

> is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

See also United Airlines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961); Camalier & Buckley-Madison, Inc. v. Madison H., Inc., 513 F. 2d 407, 420-421 (D.C. Cir. 1975); Richardson v. Communications Workers of America, 530 F. 2d 126, 130 (8th Cir. 1976); cert. den. 97 S. Ct. 77; Juliano v. Abeles, 114 N.J.L. 510, 512-513 (1935).

In the instant case the inseparability of the question of liability from that of damages goes to the very heart of the photo-cartoon sued upon. The jury was obviously so inflamed by passion and prejudice that they could not fairly evaluate the Petitioner's contention on the issue of liability that the photo-cartoon sued upon was

intended to be, and was, constitutionally protected opinion in the form of parody and satire. On the issue of damages, the same contention of the Petitioner's intent in publishing the photo-cartoon necessarily exists: namely, whether the Petitioners in fact intended to publish a parody and satire on the plaintiff, or whether they instead intended to publish the photo-cartoon as a serious assertion of fact because of their alleged spite or ill will against plaintiff.

As stated by Sacks, supra, at 241

> "Under New York Times and Gertz, the focus should be on subjective awareness of the defendant with respect to the manner in which he believes his humorous communication will be understood. If he thinks he is conveying an idea or a joke, he should be protected; if he knows or believes he will be understood to be conveying a statement of fact that he knows or believes is false, he should not be protected." (Emphasis added.)

In short, the issue of Petitioner's intent in publishing the photo-cartoon is the same on the issue of liability and on the issue of punitive damages; the two issues are interwoven. As the Court noted in United Airlines, Inc. v. Wiener, supra, 286 F.2d at 306, when a party seeks punitive damages, the questions of willfulness and wantonness require an explanation of the facts surrounding the lawsuit, and the question of damages is interwoven with that of liability.

Moreover, since Plaintiff is an all-purpose public figure, the issue of liability constitutionally requires the proving of "actual malice". Therefore, the same issue of Petitioner's intent in publishing the photo-cartoon exists in proving both actual and punitive damages and in proving liability (i.e., whether the photo-cartoon was published

with reckless disregard for its truth or falsity, or whether it was published as intended fiction in the form of parody and satire).

In the instant case the combination of (1) a grossly excessive jury verdict of $38,000,000 (or more than thirteen (13) times a reasonable verdict) resulting from extreme passion and prejudice, and (2) the issues of liability and damages which are necessarily the same and/or intertwined, constitutionally compels, pursuant to due process, a new trial for Petitioners on the issue of liability as well as damages--especially where the grossly excessive and tainted damage verdict resulted in Petitioner Flynt being held liable for substantial damages for a photo-cartoon of which the appellate court held, as a matter of law, that he had no knowledge of, or involvement in, before it was

published.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the decision entered in the Franklin County, Ohio Court of Appeals and the Ohio Supreme Court's dismissal of Petitioners' motion for that Court to accept jurisdiction over the merits of Petitioners' appeal.

Respectfully submitted,

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Dated: May 7, 1982